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Damages--Liquidated Damages or Penalty--In Contracts for Sale of Goods to Be Manufactured by Seller

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v. *A. W. Scott Co.*, 144 Minn. 173, 174 N. W. 832 (1919), although one case allows recovery in this instance. *Smart* v. *Bissonette*, 106 Conn. 447, 138 Atl. 365 A son or daughter, owning the automobile, should not be liable under the family purpose doctrine when other members of the family are in control of it. *Hall* v. *Scott*, 231 Ill. App. 494 (1923). However, a parent should be responsible for the negligent driving of a person, authorized by his minor child, or spouse, to drive on the theory of imputed agency. *Thixton* v. *Palmer*, supra; *Cohen* v. *Borgenecht*, 144 N. Y. Supp. 399 (1913). The doctrine should apply whether the member of the family is alone. *Miller* v. *Weck*, supra, or driving other members of the family. *Stowe* v. *Morris*, supra. It should include injuries both to person and to property. *Thixton* v. *Palmer*, supra; *Steel* v. *Age's Adm'x*, supra; *Wallace* v. *Hall*, supra.

In summary, it may be stated that the doctrine has filled a long felt need, and should continue to be followed until ample legislation has taken its place. Since it can be supported only on public policy and convenience it should be limited so as only to supply a remedy for those evils it was brought forward to eradicate. Therefore, it should be extended with caution and with trepidation, and should apply solely to injuries caused by the family automobile.

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DAMAGES—LIQUIDATED DAMAGES OR PENALTY—IN CONTRACTS FOR SALE OF GOODS TO BE MANUFACTURED BY SELLER.

A contract for sale of flour providing liquidated damages in case of the buyer's failure to furnish shipping instructions, on the basis of one cent per day per barrel of flour from date of sale to date of termination as expense for carrying plus 20 cents per barrel as cost of selling, and plus or minus amount of difference between market value of wheat on date of sale, and date of termination, times 4.6 times the number of barrels of flour, was held valid and enforceable, where it was shown that because of fluctuation in price of wheat it was necessary in order to stabilize the business to purchase sufficient wheat to fill an order for flour at the time the order was taken. *Quaile & Co.* v. *William Kelly Milling Co.* 184 Ark. 717, 43 S. W. (2d) 369, 79 A. L. R. 183 (1931). The court said: "The general rule is that contracts for liquidated damages, when reasonable in their character, are not to be regarded as penalties, and may be enforced between the parties. But agreements to pay fixed sums, plainly without relation to any probable damage which may follow a breach, will not be enforced. *Kothe, Trustee*, v. *R. C. Taylor Trust*, 280 U. S. 224, 50 S. Ct. 142, 72 L. Ed., 832 and *Robins* v. *Plant*, 174 Ark. 639, 297 S. W. 1027, 59 A. L. R. 1128." The courts that have been called upon to interpret such stipulations for payment of a designated sum, in case of breach of a contract for the sale of goods to be manufactured, have without exception held

them to be liquidated damages and not penalties, where the probable damages which might follow a breach were uncertain and the amount provided appeared reasonable, as of the time the contract was entered. *Larabee Flour Mills Co.* v. *Carignano* 49 F. (2d) 151 (1931); *Standard Tilton Mill Co.* v. *Toole*, 223 Ala. 450, 137 So. 13 (1931); *Christian Mills* v. *Stern Flour Co.*, 247 Ill. App. 1 (1931); *Sheffield-King Milling Co.* v. *Jacobs*, 170 Wis. 399, 175 N. W. 796 (1920); *Sheffield-King Milling Co.* v. *Domestic Science Baking Co.*, 95 Ohio St. 180, 115 N. E. 1014 (1917); *New Prague Milling Co.* v. *Hewett Grain and Prov. Co. of Escanaba*, 226 Mich. 35, 196 N. W. 890 (1924).

While the courts all reach practically the same result in this type of case, the language used would indicate a difference in the method of reasoning that is astonishing. This can best be shown by quotations from some in the decisions.

In *Yerxa, Andrews & Thurston* v. *Randazzo Macaroni Mfg. Co.*, 315 Mo. 927, 288 S. W. 20 (1926), the formula used by the majority of the courts was stated as follows: "The question is one to be determined by the contract, fairly construed, and, in arriving at a determination, the courts will seek to arrive at the intention of the parties from a consideration of the contract as a whole, the situation of the parties, the subject matter of the contract and all the circumstances surrounding its execution, together with the ease or difficulty of measuring the breach in damages, and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach". 17 C. J. 936; 8 R. C. L. 561.

The rule as stated in *Christian Mills* v. *Berthold Stern Flour Co.*, 247 Ill. App. 1, (1928), representing the minority in decided cases, but showing the recent tendency in thought on the subject, is as follows: "In our judgment it is the law that if the contractual formula, as to the measurement of damages, which the defendant prescribed in its offer, and which became an integral part of the completed contract, was fair and reasonable—having in mind the particular business involved, and the kind of merchandise to be manufactured and sold—then the formula which pertained to the seller's damages should have been recognized in the trial of the case as lawful and properly binding upon both parties."

The Federal courts have adopted much the same language as the Missouri court did in the Yerxa case, supra, as is shown in the following quotation from *Larabee Flour Mills Co.* v. *Carignano*, supra, when it quoted from *Wise* v. *U. S.*, 249 U. S. 361, 39 S. Ct. 303, 63 L. Ed. 647 (1918), as follows: "The subject of the interpretation of provisions for liquidated damages in contracts, as contradistinguished from such as provide for penalties, was elaborately and comprehensively considered by this court in *Sun Printing & Publishing Assn.* v. *Moore*, 183 U. S. 642, 22 S. Ct. 240, 46 L. Ed. 366, applied in *U. S.* v. *Bethlehem*

Steel Co., 205 U. S. 105, 27 S. Ct. 450, 51 L. Ed 631, and the result of the modern decisions was determined to be that in such cases courts will endeavor, by a construction of the agreement the parties have made, to ascertain what their intention was when they entered such stipulation for payment, of a designated sum or upon a designated basis for a breach of a covenant of their contract, precisely as they seek for the intention of the parties in other respects. When that intention is clearly ascertainable from the writing, effect will be given to the provision, as freely as to any other, where the damages are uncertain in nature or amount, or are difficult of ascertainment or where the amount stipulated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention or oppression."

No Kentucky case has been found dealing specifically with the type of stipulation here under discussion. But the Kentucky court, in enforcing a provision for liquidated damages for breach of a contract to sell land, set out its formula as follows: "Where damages resulting from the breach of an agreement would be uncertain, and evidence of their amount very difficult to obtain, and the fair import of the agreement is that the amount of money in it is specified and agreed on to save expense and avoid the difficulty of proving an actual damage, it will be regarded as liquidated damages." *Cook* v. *Johnson*, 241 Ky. 452, 44 S. W. (2d) 457 (1931). In *Commonwealth* v. *Ginn & Co.*, 111 Ky. 110, 63 S. W. 467 (1901), the court stated as a general rule that " . . . it is a question of construction, to be decided according to the intention of the parties at the time of the agreement, as to whether the sum named in the contract to be paid upon its breach by the one failing is liquidated damages, or merely a penalty".

As may be seen from these quotations the courts in the Missouri case, the Federal case, and the Kentucky case, claim that their decisions are based upon the intention of the parties and the proper construction of the contract. The Illinois court, in the Christian Mills case, supra, based its decision upon the reasonableness of the sum stipulated for as compensation for the loss occasioned by the breach. It is submitted that this is the true basis for the decision in all the cases and that the majority of the courts have tried to work these cases out by rules of construction when, in fact, they do not raise a question of construction.

If it can be said that the courts should "give effect to the clearly expressed will of the parties," the recovery of penalties will always be allowed. It is always the will of the parties that the sum stipulated for shall be paid if the main agreement is not performed. It is not a question of construction of a stipulation of a contract, nor a question of rules of damages, but is a question of the legal validity of a stipulation of a contract. It cannot be said that the language used will bear the construction which the courts put upon it nor can it be said that

the parties expressed their will that the result of the stipulation should be the result enforced by the courts. The courts cannot mean to hold that the interpretation which they put upon the contract is the meaning intended to be put upon it by the parties or a meaning which the language properly construed actually conveys. The real determination is not a construction of the language used nor a determination of the intention of the parties, but is a question of whether the stipulation which the parties have provided as a payment by the defaulting party, in case of breach, is reasonable under the circumstances, so that it will be enforced, or whether it is unreasonable and should therefore be disregarded and the amount of damages suffered be ascertained by the jury. If the matter of intention means anything, it means: Did the parties intend that the sum stipulated for should be a determination in advance of the probable loss of the seller, in case of breach, or did they intend it to be a punishment to be held in terrorem over the buyer? And this is not determined so that the courts can carry out the intentions of the parties, necessarily, but in order to decide whether or not the thing they intended to be done was enforceable.

The misleading character of the alleged search for intention is brought out by *Marshall J., in Seeman* v. *Biemann*, 108 Wis. 365, 84 N. W. 490 (1900). "While courts adhere to the doctrine that the intention of the parties must govern in regard to whether damages mentioned in their contracts are liquidated, they uniformly take such liberties in regard to the matter, based on arbitrary rules of construction, so called, as may be necessary to effect judicial notions of equity. . . . The judicial power thus exercised cannot properly be justified under any ordinary rule of judicial construction . . . But in determining whether an amount agreed upon as damages was intended as liquidated damages or as penalty, rules of language are ignored and the express intent of the parties is made to give way to the equity of the particular case, having due regard to precedents."

Two quotations from Williston on Contracts will serve as a conclusion—"Though the law can not create contractual obligations which are not based on the expressed intentions of the parties, it can excuse the performance either of conditions or promises agreed upon by the parties for any reason which seems to it just. The mere fact that a promise or condition is somewhat harsh or unfair in its operation is not enough to furnish such an excuse, but a principle of somewhat vague boundaries prohibits the enforcement of forfeitures or penalties." Sec. 769, Williston on Contracts (Student Edition).

"In spite of the language of cases regarding the intention of the parties, there is little doubt that a sum named as liquidated damages, in order to be given effect, must be reasonable in amount. To be sure, under the recent decisions of the most authoritative courts, the primary question seems to be whether the parties honestly endeavored to fix a sum equivalent in value to the breach. But as has been seen, the chief, almost the only, means of determining whether the parties in

good faith endeavored to assess the damages, is afforded by the amount of damages stipulated for, and the nature of the breach upon which the stipulation was agreed to become operative. This is but saying in other words that the reasonableness or unreasonableness of the stipulation is decisive." Sec. 779, Williston on Contracts (Student Edition).

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